

1977

## Provo City v. Hubert C. Lambert et al : Reply Brief of Defendants-Appellants

Utah Supreme Court

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Joseph Novak; Dallin W. Jensen; Attorneys for Defendants and Appellants;

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STATE OF NEW YORK  
IN SENATE  
JANUARY 10, 1917  
REPORT  
OF THE  
COMMISSIONER OF THE LAND OFFICE  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
MAY 1, 1916  
ALBANY: J.B. LIPPINCOTT COMPANY, PRINTERS  
1917

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EDWARD W. CLYDE  
Attorney for Defendant and  
Appellant Central Utah  
Water Conservancy District  
351 South State Street  
Salt Lake City, Utah 84111

JAMES B. LEE  
Attorney for Defendant and  
Appellant Kennecott Copper  
Corporation  
79 South State Street  
Salt Lake City, Utah 84101

RAY L. MONTGOMERY  
Assistant City Attorney  
Attorney for Defendant and  
Appellant Salt Lake City  
City & County Building  
Salt Lake City, Utah 84111

JACKSON HOWARD  
Attorney for Plaintiff  
and Respondent  
120 East 300 North  
Provo, Utah 84601

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IN THE SUPREME COURT OF THE STATE OF UTAH

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PROVO CITY, a municipal corporation of the State of Utah,

Plaintiff & Respondent,

Vs.

HUBERT C. LAMBERT, State Engineer of the State of Utah;  
PROVO RIVER WATER USERS ASSOCIATION, a corporation; KENNECOTT COPPER CORPORATION, a corporation; SALT LAKE CITY, a municipal corporation, CENTRAL UTAH WATER CONSERVANCY DISTRICT; UTAH LAKE DISTRIBUTING COMPANY, a corporation; UNITED STATES OF AMERICA, BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR; HUGH McKELLAR, as Provo River Commissioner; and PROVO RESERVOIR WATER USERS COMPANY, a corporation,

Defendants & Appellants.

CASE NO. 14,605

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

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The brief of respondent is so impregnated with misstatements, half-truths, inferences and innuendos throughout that to address them all would be more than appellants would care to write and we believe more than this Court would want to read. The import of respondent's approach is to brush over the inescapable conclusion that the evidence in this case simply will not support the Amended Findings of Fact, Conclusions of Law and Amended Judgment of the Court below. Accordingly, the brief of respondent cannot go unchallenged here. In this reply appellants will endeavor to address only the most serious inaccuracies and deficiencies and will strive to avoid "knit-picking".

## REPLY TO STATEMENT OF THE KIND OF CASE

In its Amended Complaint, Provo City did not seek to review that part of the decision of the State Engineer dated May 1, 1970, which concluded that paragraph 4(c) of the Provo River Decree was a flow in addition to the quantities awarded in paragraph 4(a) and 4(b), but only sought to review that part which determined that the 16.5 second feet of water awarded to Provo City under paragraph 4(c) was for power use only. (Amended Complaint - First Cause of Action; R.254). Thus the general characterization in the brief of appellants is accurate.

## REPLY TO DISPOSITION BY STATE ENGINEER

Appellants' factual statement thereof in their brief is fully documented with direct references to the findings and record in this case as distinguished from respondent's unrecorded and undocumented assertions of attempts to reason with Mr. McKellar, telephone calls, illness of the State Engineer and argumentative assertions of "unilaterally, ex parte, sua sponte and without authority...unprecedented..." and inferences that some sinister plot took place between the Provo River Commissioner and representatives of defendant Provo River Water Users Association. There is absolutely no evidence to support such reckless inferences nor could there be since no such action took place. Suffice it to say, the record speaks for itself and the evidentiary facts are accurately reported in the brief of appellants.

## REPLY TO DISPOSITION IN LOWER COURT

No testimony was taken before Judge Sorensen because the parties stipulated that the matter should be submitted on mutual

Motions For Summary Judgment which was done and the documentary evidence from the files of Civil No. 2888 submitted by both respondent and appellants became the then record in this case. On remand, the trial court ignored that part of the record and redecided the whole case solely on the basis of the matters presented at the evidentiary hearing.

#### REPLY TO STATEMENT OF FACTS

Contrary to respondent's blanket indictment, a fair and objective reading of appellants' Statement of Facts demonstrates that the relevant facts of the entire record in this case are there stated in the light most favorable to the judgment below. The Abstract of Testimony prepared by appellants contains a fair, objective statement of the substance of the testimony of all witnesses without characterization. Respondent prepared a Supplemental Abstract of Record ostensibly to include testimony which it asserts appellants omitted or mischaracterized without pointing up how or in what manner any of such testimony was mischaracterized. Accordingly, appellants deem it essential to make the following comments relative to respondent's Supplemental Abstract of Record.

As to the testimony of Dean Wheadon, the acreage figures cited therein are based on an office survey of computed acreage amenable to irrigation and were not taken from any records showing that the land involved was actually irrigated (R.974).

As to the testimony of John A. Zirbes, the same was an office-type survey, predicated on his basic assumption that the 4,758 acres were irrigated and he did not testify that the land was in fact irrigated (R.1270, 1276, 1281-82).

As to the testimony of Stanley Roberts given to the State Engineer, he testified both ways on the priority of use of the waters of the Factory Race for irrigation or power, ie. water for irrigation was only used when it was not being used for power (R.1154; 823), and that irrigation uses were contemporaneous with power uses and when there was not enough water for power it went to irrigation or municipal use (R.1153; 822). Appellants' abstract of his testimony is accurate and objective as distinguished from the laudatory characterization thereof by respondent.

As to the testimony of Marion J. Clark, the objectionable part is respondent's assertion that he always delivered the 16.5 c.f.s. to Provo City for irrigation purposes whereas he included the 16.5 c.f.s. in his summary sheets to determine Provo City's share (R.1094-95; 754) with no knowledge of where the water went once it was delivered (R.1104; 760) or how many acres were being irrigated by Provo City (R.1101; 757).

As to the testimony of Hugh A. McKellar, respondent's summary is objectionable in the way it is cast as implying that Mr. McKellar was hired as Superintendent for defendant Provo River Water Users Association in 1971 at twice his previous salary as some sort of reward for refusing to deliver the 16.5 c.f.s. to Provo City in 1969 which inference is wholly unsubstantiated in the record and is emphatically denied by appellants. What respondent purposely failed to tell this Court is that the commissioner's job is only part time during the irrigation season whereas the superintendent's job is full time and that Mr. McKellar was employed after the sudden and untimely death of the Association's then superintendent Mendenhall.



As to the testimony of Thomas Rice, law clerk for respondent's counsel (R.1188), he simply identified various documents which he obtained from the files of the State Engineer (R.1188) or Provo City (R.1195).

As to the testimony of Dee C. Hansen, respondent's summary is simply an effort to pick and choose various points from his testimony in an effort to show that he performed poorly in carrying out the mandate of the court. Needless to say, the record in this case speaks for itself as to the comprehensive in-depth investigation conducted by the State Engineer. Most important is that respondent totally failed to show that there is any competent evidence in the record to controvert the findings of the State Engineer that Provo City never irrigated any land in excess of the acreages set forth under paragraphs 4(a) and 4(b) of the Provo River Decree.

On page 6 of its brief, respondent urges that the interim decision of Judge Morse on November 26, 1917, is not material here since it was superseded by the decree of May 2, 1921. Appellants say that the interim decision of Judge Morse is key to interpreting the ambiguous language of paragraph 4(c) of the 1921 decree. Paragraph 4(c) had its origin in the 1917 decision as a use for power purposes (R.88) and was specifically identified as the "power right water" in the post 1917 decision proceedings ((R.91, 92). The only change was to increase the quantity from 13.75 second feet to 16.50 second feet as being necessary to operate the machinery of the mills (R.95-98 incl.). Nowhere does it appear that the increase was needed to irrigate additional acreage. In all other respects, the right remains the same and is traced step by step from the 1917

decision to the 1921 decree as documented on pages 11, 12 and 13 of appellants' brief.

The facts found by the State Engineer pursuant to the referral from the District Court are essential to an understanding of how and why the court below committed its reversible error. Those facts were presented to the trial court to aid in its determination from the historical or other data, or from other investigations as to the use, if any, made of the water here in question pursuant to the remittitur of this Court (R.216). Accordingly, those facts cannot be ignored in this appeal.

Respondent's criticisms of appellants' Statement of Facts places into focus the three basic erroneous premises which it asserted in the court below and which the trial court accepted resulting in its erroneous decision, ie.

(1) The record made in the trial court which was before this Court on the prior appeal, should be ignored;

(2) Provo City's irrigation water rights were predicated on irrigable acreages and not irrigated acreages; and

(3) How the various river commissioners said they distributed the Provo River waters to Provo City was more controlling than how they in fact distributed the water.

As to (1) above, respondent would have this Court ignore that part of the record in this case which was before this Court on the prior appeal as respondent persuaded the trial court to do. This respondent does in spite of the fact that it stipulated that the then record would be comprised of extracts from the files of Civil No. 2888 (R.1576, 1577) and in spite of the fact that it submitted

some 47 pages of extracts (R.81-121 incl.; 132-137 incl.) as its evidence for the record in this case. Thus, respondent's assertion on page 5 of its brief that "there was no record of testimony and evidence on the prior appeal" simply is not true.

The importance of (1) above is that respondent's own evidence in that part of the record established that in 1921 the total irrigated acreage under Provo City's irrigation system outside of the platted portion of the city was 2,058.6 acres (R.168) comprising 1,925 farm acres and 133.6 acres of farm lots (R.167) and was the exact acreage awarded to Provo City as farm acreage under paragraph 4(a) of the Provo River Decree. Likewise, respondent's own evidence in that part of the record sought to establish that there were 701.4 acres of irrigated platted lots of which 133.6 acres were farm lots (R.167) and the balance (567.8 acres) were city lots. At the evidentiary hearing in this case it was established from the files of Civil No. 2888 that in that proceeding the city lot irrigated acreage was disputed, a resurvey was made resulting in 505.73 irrigated acres of city lots which was reduced after further studies to an irrigated acreage of 499.91 acres (A.54, R.1352, 1353) which was the exact acreage awarded to Provo City as city lots under paragraph 4(b) of the Provo River Decree.

The significance of it all is that respondent's own evidence in that part of the record in this case established that the maximum irrigated acreage under the Provo City irrigation system was a total of 2,558.6 acres at the time of the entry of the Provo River Decree. That is why respondent would urge this Court as it did in the court below to ignore that part of the record in this case and substitute

therefore a standard of irrigable acreage under (2) above.

As to (2) above, we submit that the standard of irrigable acreage adopted by the trial court is error as a matter of law. Yet it is on the basis of irrigable acreage that respondent prevailed in the trial court and urges the same basis before this Court to affirm the judgment of the court below. In so doing, respondent repeatedly uses the terms irrigable and irrigated interchangeably to serve its own purposes.

Thus, on pages 5 and 6 of respondent's brief, it asserts that the City Engineer, Mr. Zirbes, calculated the number of acres amenable to irrigation in 1921 by use of the 4(c) water to be not less than 1,407.87 acres, and in the very next breath asserts that the total acreage irrigated by rights under 4(a), (b) and (c) was 4,758 acres. That statement is inaccurate, deceptive and misleading. Nowhere in the record, and particularly in R.1270-1275 and Ex.20, does it appear that such acreage had been irrigated as distinguished from being irrigable and respondent is challenged to substantiate the truth thereof. The fact is, as later stated on pages 19 and 20 of respondent's brief that Mr. Zirbes testified that the area within the city was 4,758 acres and he assumed that the 4,758 acres were subject to the city's 4(a), 4(b) and 4(c) rights in 1921 and after a series of objected-to arithmetical computations concluded that there were 1,407.87 acres unaccounted for by the acreage duties for Provo City's irrigation rights (R.1274, 1276, 1288).

Likewise, on page 11 of its brief, respondent recklessly asserts that the State Engineer in his computations on Exhibit E

left out hundreds of acres of land south of Sixth South which were generally shown to be irrigated on Provo City's Exhibit 3 and Exhibit 18. Those exhibits do not show irrigated acreages. Respondent then makes the blanket assertion that respondent's evidence demonstrated that there was substantially more acreage irrigated by the canal system in 1937-1938 without a single reference to the record.

On page 12 of respondent's brief, the assertion is made that the City Engineer Zirbes established that "based on the minimum acreage to be watered, the duty would be 85.3 acres per acre foot (sic)". Thus, respondent talks in terms of irrigable acreage rather than irrigated acreage in reaching that conclusion.

Again on page 15 of respondent's brief, reference is made to the testimony of its witness, Wheaden, to the effect that the 1921 maps show 5,280 acres of land within Provo City as amenable to irrigation and then estimates that "between 1,200 and 1,400 acres and probably up to 20% greater" had been irrigated by the 4(c) right in 1921. The substance of it all is that the record simply will not support respondent's erroneous assertions.

As to (3) above, respondent relentlessly pursues the notion that all of the river commissioners up until Mr. McKellar interpreted paragraph 4(c) as awarding to Provo City an irrigation right in addition to paragraphs 4(a) and 4(b) and intended to deliver the water accordingly. How the commissioners say they delivered or intended to deliver the water becomes meaningless when the evidence including respondent's own exhibits 15(a), (b) and (c) show the recorded quantities of water in fact delivered by them. Those

exhibits speak for themselves and suffice it to say that whenever the red line falls below the blue line, as shown on Exhibit 14, ie. 92.5% of the time during the last 40 years, respondent's assertion is untrue. This is no false syllogism. It is an evidentiary fact.

#### REPLY TO INTRODUCTION TO ARGUMENT

There is something basically wrong about a brief which will take a series of phrases out of context and combine them into a disjointed string and then charge that such is demeaning to the trial judge. The unfairness of it all becomes evident when the extracted phrases are read in the context in which they are used on pages 23, 24 and 49 of appellants' brief.

#### REPLY TO POINT I

The directive of the remand was to augment the record on the use, if any, made of the water in question and the case was remitted to the district court for a determination from the historical or other data as to the use of the water in question (R.216). Nowhere do appellants argue that the trial court had no authority at all to make findings contrary to the previous summary judgment as stated on page 25 of respondent's brief. Rather, it is appellants' steadfast position that the trial court was obliged to make findings as to the use made of the water under paragraph 4(c) of the Provo River Decree and to certify those findings back to this Court such that this Court could determine whether the summary judgment should be affirmed, reversed or modified.

Referring to page 31 of respondent's brief, appellants are at a loss to know where in the record there is a plethora of



believable proof to support the amended findings complained of by appellants. Such findings are predicated on proof of irrigable acres or acrea amenable to irrigation and the quantities of water which the water commissioners say they intended to deliver. And since the evidence, including that offered by respondent, overwhelmingly shows that the number of acres of land actually irrigated and the quantities of water actually delivered to Provo City to be otherwise, the evidence clearly preponderates against such findings.

Respondent would have this Court believe that the Provo River Decree, which contains detailed acreage for all irrigation users (with minor exceptions) simply failed to describe a large block of irrigated acreage which respondent now claims. The record in Civil No. 2888 shows that during the pre-1921 era a total of 2558.6 acres of land was being irrigated under the Provo City Canal System. The State Engineer's review of the map which formed a part of that record and which contained the Provo River distribution system showed 2569.81 acres of irrigated land. The 1937-38 survey from maps which Provo City furnished the State Engineer showed only 2303.38 acres of land being irrigated. The 1969 hydrographic survey which the State Engineer conducted as a part of the general adjudication proceedings in the Utah Lake/Jordan River drainage basin shows only 2154.56 acres of land being irrigated.

In the face of this definitive evidence, it is incredible that respondent would now claim that it has in the past irrigated a large block of additional land which no one seems to be able to find. It is in the face of this hard evidence that Provo City

offers its weak argument that the additional land was amenable to irrigation. This may be true, but as appellants repeatedly point out in their primary brief, this has never been a basis and cannot serve as a basis for a water right in Utah. Beneficial use of water has always been the cornerstone of the appropriation system, and to suggest that a water right could be acquired by simply showing that land is physically located so that it could be irrigated by an existing distribution system has never served to establish a water right. If such were the test, the Utah water right structure would be undermined by claims of users asserting that they could irrigate other lands located on their property which in fact have never been irrigated, thus enlarging their rights to the detriment of other users. The end result would destroy Utah's system of water law.

#### REPLY TO POINT II

Respondent's assertion on page 32 of its brief that the evidence presented by the witnesses named and the exhibits identified all clearly demonstrate that Provo City in 1921 had at least 4,133 acres under irrigation in addition to the First Ward pasture is simply untrue. The witnesses Wheadon and Zirbes testified as to the number of irrigable acres and neither had any knowledge as to the actual irrigated acreages. Suffice it to say irrigable acreage is not competent evidence of the nature and extent of Provo City's water rights.

The remaining named witnesses testified as to the irrigation of various isolated parcels and was competent evidence to the extent that such was within their personal knowledge. However, none of those witnesses, individually or collectively, testified as to the



total number of acres irrigated under either the City Race, Factory Race, East Union Canal or Tanner Race, either separately or under all of the canals combined. Respondent's evidence extracted from the files of Civil No. 2888 did establish that there were 723.4 acres under the City Race (R.167) and 430.5 acres under the Tanner Race (R.167) and that the total acreage outside of the platted portion of the city under all of its canals was 2,058.6 acres (R.168).

Appellants fully realize that the trial court has the prerogative of passing on the credibility of the witnesses. Be that as it may, the trial court must base its findings on competent evidence, viz., irrigated acreage, and not irrigable acreage as was done here.

#### REPLY TO POINT III

If the Provo River Decree is not ambiguous, the trial court erred in considering any extrinsic evidence at all and should have looked only to the Provo River Decree and ruled on the meaning of paragraph 4(c). Both the remand of this Court and its opinion in the prior appeal constitute a clear determination by this Court that paragraph 4(c) was in fact ambiguous and directed that additional extrinsic evidence be taken to aid in a correct interpretation. To say that after some 79 pages of extrinsic documents, some 975 transcript pages of extrinsic testimony and argument and some 36 extrinsic exhibits, paragraph 4(c) suddenly became clear and unambiguous is nonsense. And to speculate as respondent does that the primary reason for not attaching a duty to the 4(c) water is that it had to irrigate accretion land adjoining Utah Lake is absurd.

To say as respondent does on page 34 of its brief that at

the time of the 1921 Decree all of the parties recognized that the 16.5 c.f.s. (4(c) water) was owned by Provo City for irrigation purposes has no basis in the record, either here or there, and has to be a most reckless statement and to conclude therefrom that some of the present defendants are barred under the principles of res adjudicata is absurd. To then say what the downstream users understood about Provo City's irrigation rights without a scintilla of evidence thereon has to be irresponsible.

#### REPLY TO POINT IV

Appellants have no quarrel with the doctrine of practical construction. However, respondent must be aware that such doctrine applies only to ambiguous judgments and is wholly inconsistent with its position under its Point III. Exhibits 14, 15(a), (b) and (c) show the quantities of water delivered to Provo City for a period of 40 years and thereby demonstrate the practical construction of the 1921 Decree. Exhibit 14 conclusively shows that the block of water between the blue and red lines which respondent now claims has never been delivered to nor used by Provo City. That exhibit conclusively shows that if the judgment of the trial court is permitted to stand, that block of water will be taken away from the junior appropriators, notably the defendant water users herein, and will be given to Provo City in perpetuity. Appellants squarely raised this point and addressed this issue in their primary brief and the lack of any response thereto by respondent is conspicuous by its absence. Apparently respondent concedes this point and hopes to retain its windfall of this block of water by remaining silent thereon.

## CONCLUSION

Respondent's brief places into focus three key elements of this appeal whereby it would ignore that part of the record where respondent's own evidence establishes that in 1921 its irrigated acreage did not exceed 2,558.6 acres; defend the judgment on the basis of irrigable rather than irrigated acreages and casually interchange the two; and defend the judgment on the basis of what quantities of water the river commissioners say they intended to deliver to Provo City and pay only lip service to the quantities of water actually delivered to it.


Respondent received a windfall in perpetuity from the trial court in the form of a block of water shown on Exhibit 14 between the blue and the red lines which will be taken away from the junior appropriators and notably the defendant water users in this case. Respondent's brief does not address this facet of the appeal which is the bottom line and really what this case is all about.

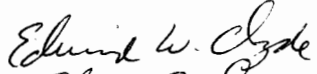

Appellants respectfully submit that the Amended Findings of Fact and Conclusions of Law must be set aside in toto, the Amended Judgment must be reversed and this Court should affirm the Summary Judgment made and entered herein on the 16th day of August, 1971.

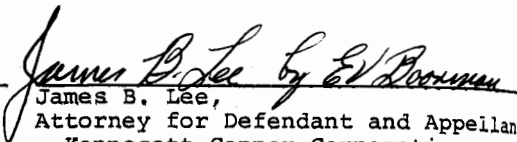
Respectfully submitted,

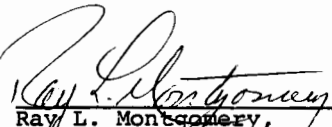


Joseph Novak  
Attorney for Defendants and Appellants  
Provo River Water Users Association,  
Utah Lake Distributing Company and  
Provo Reservoir Water Users Company  
520 Continental Bank Building  
Salt Lake City, Utah 84101

  
Dallin W. Jensen,  
Assistant Attorney General  
Attorney for Defendants and  
Appellants, State Engineer  
and River Commissioner  
442 State Capitol  
Salt Lake City, Utah 84114

  
  
Edward W. Clyde,  
Attorney for Defendant and  
Appellant Central Utah  
Water Conservancy District  
351 South State Street  
Salt Lake City, Utah 84111

  
James B. Lee,  
Attorney for Defendant and Appellant  
Kennecott Copper Corporation  
79 South State Street  
Salt Lake City, Utah 84101

  
Ray L. Montgomery,  
Assistant City Attorney  
Attorney for Defendant and Appellant  
Salt Lake City  
City & County Building  
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that on the 9<sup>th</sup> day of September, 1977,  
I mailed two (2) copies of the foregoing Reply Brief of Defendants-  
Appellants to

Jackson Howard  
Attorney for Plaintiff  
and Respondent  
120 East 300 North  
Provo, Utah 84601

Ramon M. Child,  
United States Attorney  
Attorney for Defendant and  
Appellant United States of  
America, Bureau of Reclamation  
200 U. S. Post Office and  
Courthouse Building  
Salt Lake City, Utah 84101

  
Joseph D. Walsh  
Attorney